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Dependent Relative Revocation

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NOTES

DEPENDENT RELATIVE REVOCATION

In the November number of the Kentucky Law Journal[1] is an interesting discussion by a note writer on the subject of dependent relative revocation in Kentucky. He observes *inter alia* that the general doctrine is applied in its entirety in something more than half of the states, is accepted by other states with limitations, and is not referred to at all in Kentucky. He observes, however, that there are certain cases which seem to raise the question whether or not the doctrine is recognized in the state, and he discusses interestingly several of them, among which is *Wells* v. *Wells*.[2] In this case he finds that the testator had the name of one of the executors stricken from the will and the name of another inserted, but there was no formal execution of the will thereafter. The will was admitted to probate. He says that there were three alternatives possible with reference to the determination of the question, who is the executor. First, the original will might be probated without change; second, that there was a partial revocation, and third that the substituted executor might act in place of the one formerly named. He also finds that the doctrine of dependent relative revocation is based essentially upon mistake. He does not refer to an article on the same subject written by Professor Joseph Warren and published in the Harvard Law Review[3] which, to the mind of the present writer, almost completely revolutionizes our attitude towards the subject and shows how the courts have misunderstood what they were in fact doing.

Professor Warren points out that there are two concepts constantly confused. One is that of a conditional revocation in which the testator does some act of a revocatory nature, but is all the time in a conditional frame of mind, so to speak. He says in substance to himself, "This act which I am doing, in form an act of revocation, is not at the present time intended as a revocation, but it is preliminary and will be a revocation as soon as I have done some further act." It seems quite evident that this type of case is exceedingly rare.

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[1] 16 Ky. L. Jour. 54
[2] 4 T. B. Mon. 152 (Ky.)
[3] 33 Harv. L. Rev. 337 (1920).

Mr. Warren finds the second type of case to be based on mistake. The testator does in fact an act of revocation and intends it to be a revocation, but the presupposition under which the act was performed fails. In such case, however, there is very clearly a revocation, and he shows that when the courts have called it a conditional or dependent relative revocation they have deceived themselves, and what they have actually done where the will was probated, was to set aside the revocation and restore the will. It is altogether probable that the courts have not realized that that is precisely what they are doing. Assuming however, that a revocation has been made under a mistaken presupposition, what shall we do? It seems evident that if the testator could now be asked whether he desired his original will to stand and if he would reply that he did wish it to stand, that the revocation should be set aside and the will restored. If, however, he would desire the will to be revoked in case he cannot have the dispositions which he really desired, then the revocation should not be set aside and the original will should not be restored to efficacy.

How shall we determine whether or not he would desire to have the original will stand or not stand, under the circumstances? If the will which is insufficiently executed be substantially like the will which was revoked, it is fair to say that there are equitable grounds for setting the revocation aside. It would also seem that if there have been substantial changes with respect to the beneficiaaries then there are no equitable grounds for setting the revocation aside. Under this view, it would seem that the court in *Powell* v. *Powell*[4] reached a wrong conclusion. There the testator in the original will gave his property to his grandson. In a later will he gave the property to his nephew. The later will was destroyed under a mistaken belief that the destruction of it would revive the former will. The court held that the destroyed will should stand and that it was not revoked. What actually happened was that the second will which was revoked by destruction, was restored, in direct conflict with the desire of the testator who, it appears, had fallen out with the nephew and desired the property to go to his grandson. If the revocation of the second will had not been set aside and he had been held to have died intestate, his desires

[4] L. R. 1 P. & D. 209 (1866)

would have been much more nearly carried out, for the grandson would have taken as an heir.

It is not clear quite how the writer of the note reaches the conclusion that the general doctrine is applied in its entirety in more than half the states, nor how he finds that it is applied with limitations in other states. The present writer supposes that it is a part of the general technique of all common-law jurisdictions.

The present writer would suppose in the *Wells* v. *Wells* case that here it is pretty clearly a case of revocation and the revocation should be set aside on equitable grounds and that therefore the original will should stand without change. He does not see how the doctrine of partial revocation can in any way be applicable to this case; *that is to say, if there was in fact a revocation.* Of course, if there was no revocation at all except as to one of the executors, then there is no problem of dependent relative revocation.

The case of *Sanders* v. *Babbitt*[5] seems to be clearly a case of revocation without equitable grounds for setting the revocation aside. It is true there is a failure in the presupposition under which the revocation took place, but the case is unlike *Onions* v. *Tyrer*[6] where the subsequent instrument which failed was substantially the same as the revoked instrument. It seems hardly fair to say that the Kentucky court refuses to apply the doctrine of dependent relative revocation. What the court held was in substance that there was a revocation and that there was no ground for setting it aside.

The importance of Professor Warren's article in clearing up the problem here involved can scarcely be over-estimated. The writer of the note has shown the former view of the courts and the lack of any definition of this subject or *rationale* of the doctrine. We wish he had discussed the problem also in the light of Mr. Warren's article.

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[5] 106 Ky. 646 (1893)
[6] 2 Berm. 742 (1717)